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Summary record of the 2711th meeting

Held at Headquarters, New York, on Thursday, 25 March 2010, at 10 a.m.

Chair: Mr. Iwasawa

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The meeting was called to order at 10.15 a.m.

General comments of the Committee (*continued*)

Draft general comment No. 34 on article 19 of the Covenant (*continued*) (CCPR/C/GC/34/CRP.2)

1. **The Chair** invited the Committee to resume its first reading of draft general comment No. 34 on article 19 of the Covenant (CCPR/C/GC/34/CRP.2).

Paragraph 20 (*continued*)

2. **Mr. O'Flaherty**, speaking as rapporteur for the draft general comment on article 19, recalled that some Committee members had said that paragraph 20 had been too short, given the importance of its subject matter, and that the cross-reference to the general comment, while accurate, had sent out the wrong message. In response, he said that the issues covered in the paragraph were further addressed in paragraphs 36 and 37. He proposed inserting the following two sentences, taken from paragraph 25 of general comment No. 25 on article 25, immediately after the first sentence: "The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion."

3. **Ms. Chanet** said that in the light of that proposed change, the last sentence was no longer necessary. If it had to be kept, it should at least be shortened by deleting the words "detailed guidance".

4. *Paragraph 20 pertaining to article 19 of the Covenant was approved as amended.*

5. **Mr. Thelin**, returning to the previous section, wished to know what had come of his proposal to reverse the order of the paragraphs to start with paragraphs 18 and 19 and closing the section with paragraph 17, in order to highlight the importance of access to information held by public bodies first.

6. **Mr. O'Flaherty** said that he had no objection and would simply have to make some grammatical adjustments to ensure that paragraph 17 read logically in its new location.

7. **Sir Nigel Rodley** said that the structure of the section might also be affected by his proposal to introduce, at the next session, two new paragraphs on transparency and accountability.

Limitations on freedom of expression: paragraphs 21 to 48

8. **Mr. O'Flaherty**, introducing the section, explained that paragraphs 21 to 23 contained general observations on limitations; paragraphs 24 to 27 were on the meaning of "law"; paragraph 28 dealt with the concept of necessity; paragraph 29 referred to the principle of proportionality; paragraph 30 addressed the notion of margin of appreciation; paragraphs 30 to 34 were on the permissible grounds of restriction; and paragraphs 35 to 48 concerned situations where grounds were invoked in general without mention of any ground in particular.

9. The draft did not address the meaning of the phrase "special duties and responsibilities", owing to a lack of Committee practice on the matter. The only references he could find involved cases where special duties and responsibilities fell on the State rather than on the rights holders. He would therefore appreciate any help from the Committee on how the issue could be tackled.

10. **Ms. Chanet** said that there were a few communications on special duties and responsibilities, although she could not immediately find the references. Restrictions on the exercise of freedom of expression could not diminish the right itself. She suggested adding after the second sentence a cross-reference to article 5, paragraph 1, of the Covenant.

11. **Ms. Wedgwood** said that a new section should not start with a headline that said "Limitations on freedom of expression"; the use of "limitations" could send out a pro-censorship message, turning the section into an open category subject to exuberant jurisprudence which might encourage States to become tendentious on the subject of freedom of expression.

12. She suggested changing the heading to "Scope of freedom of expression" and starting off with a specific reference to article 19, paragraph 3. That was particularly important in the case of paragraph 21, which stated that the restrictions "may relate either to the interests of other persons or groups or to those of the community as a whole", without defining the word "interests". That term had a broader meaning, in her view, than "rights and reputations of others" and even "protection of national security and public order".

Lastly, if the case law indicated that the phrase "special duties and responsibilities" applied as much or more to States than to rights holders, then the first sentence could be redrafted.

13. **Ms. Motoc** said that while the Committee had indeed considered article 5, paragraph 1, only in the communication *A. K. and A. R. v. Uzbekistan*, it was important enough to be included in the paragraph, because it dealt with the conflict among the different rights promoted by the Committee. Turning to the heading of the section, she said that the word "limitation" should be maintained, at least to indicate that there had to be some limitation to the rampant defamation and violence found in the media, particularly in the newly democratic countries of Eastern Europe.

14. **Mr. Amor** said that, as jurists, the Committee members should, even without the help of case law, be able to examine the phrase "special duties and responsibilities" in more detail and try to give some guidance as to its meaning.

15. **Ms. Keller** said that while a reference for proportionality and limits to freedom of expression was necessary, the *A. K. and A. R. v. Uzbekistan* case was not the ideal vehicle, because it dealt with non-violation and not proportionality.

16. **Sir Nigel Rodley** said that he, too, felt that the heading for the section should be "Scope of freedom of expression" because the wrong message would be sent if such a large portion of the general comment was devoted to limitations. The heading as it stood was also misleading because much of the section dealt with limitations on limitations.

17. Turning to the concern that States might use the text to impose unwarranted restrictions, he suggested replacing the word "restrictions" in the second line of the first sentence with "specified restrictions", as more clearly enunciated in paragraph 22.

18. **Ms. Motoc** said that while *A. K. and A. R. v. Uzbekistan* was a case of non-violation, article 5, paragraph 1, was still invoked in respect of possible conflict between freedom of expression and other rights and should therefore be mentioned.

19. **Mr. Thelin** said that the proposed heading of the section was similar to the heading of the section covering paragraphs 11 to 13. He suggested changing the heading to "General restrictions on freedom of expression", especially as the next section dealt with specific restrictions.

20. **Ms. Chanet** said that reference should be made to article 5, paragraph 1, because, while it referred to proportionality, it went somewhat further, as there could be cases where there was just a hint of proportionality, but where that proportionality could nevertheless seriously compromise a right to the point of even eliminating it altogether.

21. Turning to Mr. Amor's suggestion that the phrase "special duties and responsibilities" should be explained in more detail, she said that there was no need for the Committee to dwell on it because the special duties and responsibilities were clearly spelled out in article 19, paragraph 3, of the Covenant and any attempted definition would only add limitations that were not contained in the Covenant.

22. **Mr. O'Flaherty** said he had no objection to Sir Nigel's proposal in regard to the title. However, a change would have to be made to one of the other titles in order to avoid repetition. The words "Scope of" could be omitted from the title that preceded paragraph 11. The title preceding paragraph 21 would be changed to "Scope of freedom of expression". There were similar problems with titles later in the text, as the word "limitation" appeared in some of them, but they could easily be changed.

23. In respect of "special duties and responsibilities", a cross-reference to article 5 could be inserted. Paragraph 21 was the best place to locate that reference. The paragraph should be kept brief, for all the reasons Ms. Chanet had mentioned. Proportionality was dealt with very clearly in paragraph 29.

24. He would consult Communication No. 1233/2003 (*A. K. and A. R. v. Uzbekistan*), before the second reading to determine whether it should be mentioned in a footnote. Although the case had been found inadmissible, it could still be cited if to do so would be enlightening.

25. He had no objection to the proposal to insert the word "specified" before the word "restrictions". The first sentence of the paragraph could end after the word "responsibilities" and a new sentence could be inserted that referred to article 5, paragraph 1, recalling that nothing in the Covenant could be invoked to diminish a right. The word "However" at the beginning of the next sentence could then be deleted. The reference in the

last sentence to general comment No. 27 should be retained. The quote could be kept in the paragraph, and the reference to the general comment could be put in a footnote.

26. **Ms. Wedgwood** said that another possibility for the chapeau was "Permissible limitations on freedom of expression". Her purpose was to avoid an open invitation to limit freedom of expression.

27. **Mr. Fathalla** said that the wording from article 19, paragraph 3, should be retained. The word "specified" should therefore not appear. Paragraph 21 and the title should use the wording from that article so as to avoid confusion.

28. **Mr. Amor** asked how the Committee wanted to enlighten States on special duties and responsibilities. He sought clarification as to whether Mr. O'Flaherty had consulted the relevant *travaux préparatoires* or the work of Nowak.

29. **Mr. O'Flaherty** said that Nowak and another scholar, Sarah Joseph, had written that the Committee had never really engaged with the term, except occasionally to invoke it to remind States that their scope for restriction was very limited. Although article 19 seemed to refer to rights holders, the Committee had used it to restrict the behaviour of States. The *travaux préparatoires* were a subordinate source, and he had not consulted them. He was convinced by Ms. Chanet's approach and proposed a slight adjustment to the paragraph on that basis.

30. **Ms. Motoc** said that the Committee had discussed the *travaux préparatoires* and agreed that they should be used.

31. **Mr. Amor** said he supported the direction the discussion was taking. However, he would consult the *travaux préparatoires*, and he might have some suggestions during the second reading.

32. **Mr. Lallah** said that it emerged from the discussion that the restrictions were strictly limited, and that further limitations were required. He asked Mr. O'Flaherty to consider different wording in the first sentence of paragraph 21 following the words "for this reason", to read, "two limitative areas of restriction on the right are permitted". A new sentence would follow which would set the terms of the two areas of restrictions, i.e., to respect the rights of others and to protect national security. The sentence beginning with "However" would then be retained.

33. **The Chair** asked if there was agreement among the members of the Committee about changing the title of the section to "Scope of freedom of expression".

34. **Ms. Wedgwood** said that the section was about limitations, not scope. Scope should not be thought of in negative terms only. She favoured such cautionary language as "permissible limitations", so as not to confuse readers.

35. **Sir Nigel Rodley** noted that most members favoured the word "scope", and that Ms. Wedgwood herself had initially suggested it.

36. **Ms. Wedgwood** said that she withdrew her suggestion.

37. **Mr. Fathalla** said that he agreed with Ms. Wedgwood. For the title, he preferred the words "permissible" and "restriction", as in article 19, paragraph 3.

38. **The Chair** asked the members whether they preferred "scope" or "permissible restrictions".

39. **Mr. Lallah** suggested returning to the chapeau after the substantive paragraphs in the section had been dealt with.

40. **Mr. O'Flaherty** said that he agreed with Mr. Lallah that quotations should be accurate. His suggestion was acceptable, exactly as proposed, since it introduced an exact quote from the article.

41. **Mr. Lallah** read out his proposed change. He had suggested a slight modification to the first sentence, so that it would read, "Paragraph 3 expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason two limitative areas of restrictions on the right are permitted, which relate ..." followed by a quote from article 19, paragraphs 3a and 3b. After the full stop, the word "However" would be retained, as would the remainder of that sentence.

42. **Mr. O'Flaherty** said that a new sentence containing a reference to article 5, paragraph 1, could go just after the sentence beginning with the word "However". "The Committee also recalls the provision of article 5, paragraph 1, whereby ..." followed by the exact words from that paragraph, with no editorial comments. That should be followed by the final sentence, which was a quotation from general comment No. 27, with the reference to general comment No. 27 going into a footnote. The final sentence was an

elegant and effective way to make an important statement.

43. With Mr. Lallah's proposal, paragraph 21 was settled, except for the heading, to which the Committee would return during the second reading.

44. *Paragraph 21 pertaining to article 19 of the Covenant, as amended, was approved.*

45. **Mr. Amor** said that the only question remaining in regard to his proposal made at the 2699th meeting was where to insert it.

46. **Mr. O'Flaherty**, speaking in his capacity as an expert, said that while the second sentence might be acceptable, the first sentence created difficulties with reference to gathering statistics and disaggregation of data. It had been his understanding, furthermore, that it had been intended for placement in an earlier section, entitled "Freedom of opinion".

47. **Sir Nigel Rodley** sought clarification as to whether the proposal stated that no information on an individual's political, religious or other opinions should be held in files kept by agents of the private or public sector, or whether regardless of what was held, no reference should be made to such information. The English version suggested the latter; that was less clear from the French version. If the intention was that such information could be held, but not referred to publicly, that would not necessarily lead to the problem mentioned by Mr. O'Flaherty, because the holding of census data did not mean that the data could be referred to individually. On the contrary, in a credible census, personal information was not referred to individually.

48. If the meaning was not that the information could not be stored but that it could not be referred to, a change should be made to the English version. The phrase at the end of the first sentence, "is not acceptable", should be removed, as it sounded like the language of diplomacy rather than the language of law. The sentence should read, "There should be no reference to an individual's political, religious or other opinions in the files kept by agents of the private or public sector."

49. **Mr. Fathalla** said that he did not understand how a reference to a person's opinions in identity documents could be said to be incompatible with article 19, paragraph 1, of the Covenant, since it did not interfere with the right enshrined therein to hold opinions.

50. **Ms. Wedgwood** said that, in the private sector, mass mailing agencies collected information about the political and religious opinions of individuals in order to target particular markets. That was legitimate, as was, in the public sector, the identification of the political opinions of potential candidates in pre-election contests.

51. **Mr. Lallah** wished it to be clarified whether what was unacceptable was the disclosure of information about opinions held in records or the fact of including such information in records. Many States parties needed to know how many people practised a particular religion as a basis for determining subsidies.

52. **Mr. Thelin** said that he had taken the proposal to mean non-consensual disclosure of information but that he would welcome clarification.

53. **Mr. Amor** said that there had been a misunderstanding regarding the first sentence of his proposal, which concerned the information held on public and private sector personnel. In the civil service, an individual's file could include a reference to his or her religion or political affiliations, which could be a factor in promotion. In the private sector, the labelling of someone as a trade union activist could similarly be a source of discrimination. Such cases thus violated article 19, paragraph 1. The inclusion of such information in identity documents could also lead to discrimination. Greece, for example, had formerly specified in such documents whether the holder was of the Orthodox faith and on that basis recognized certain individual rights. Following criticism, it had discontinued the practice. The new paragraph could be placed after paragraph 5 or 9 of the draft general comment. He did not object to the rewording of the first sentence proposed by Sir Nigel Rodley.

54. **Ms. Wedgwood** said that she shared the concern about individual privacy. However, in some countries such as Lebanon, where candidates for elective office were required to be of a particular religious persuasion, public files met the need for vetting.

55. **Mr. Fathalla** said that he still had doubts as to whether the inclusion of such information in identity documents constituted an interference with the right to hold opinions, while agreeing that such information must not be a source of discrimination. Many countries

required an indication of religion in identity documents for marriage purposes.

56. **Mr. O'Flaherty** said that he agreed that the issue was not one that related directly to article 19; it turned, rather, around privacy concerns and was therefore more germane to article 17. While it needed to be addressed, the draft general comment on article 19 was not the best place for it.

57. **Mr. Lallah** said that the reference in the two sentences of the proposal to "other" opinions was too broad. He regretted the absence of case law to guide the Committee's approach, particularly as to where the proposed new paragraph should be placed and whether the concern expressed should be attached to another article, for example, 3, 17 or 26.

58. **Sir Nigel Rodley** recalled that the right to express an opinion included the right not to express it. Accordingly, the proposal fell squarely under article 19.1. In any case, it was a concern that needed to be addressed, since cases arose, even more recently than the Greek example, where individuals were required to disclose information that should not have to be disclosed.

59. **Ms. Chanet**, while expressing support for the proposal, said that it was too restrictive. She agreed with the proposal to remove the word "other" and said that the broader issue of personal data protection needed to be tackled.

60. **The Chair** said that he was still unclear as to what was meant by "files". He asked Mr. Amor to review his proposal in the light of members' comments and to revert to it at the Committee's next session.

61. **Mr. Thelin** repeated his earlier request that all changes to the current version of the draft general comment should be tracked.

62. **Mr. O'Flaherty** said that he understood that to be possible only in one language version; he would ensure that changes were tracked in the original, English version. He would make adjustments not only to those parts of the draft already considered but also to other parts, where they were affected by approved changes.

The discussion covered in the summary record ended at 11.45 a.m.